



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 33**

**[EPA-HQ-OA-2006-0278; FRL-9946-27-OA]**

**RIN 2090-AA40**

### **Participation by Disadvantaged Business Enterprises in Procurements Under EPA**

#### **Financial Assistance Agreements**

**AGENCY:** Environmental Protection Agency

**ACTION:** Direct final rule.

**SUMMARY:** Environmental Protection Agency (EPA) is taking direct final action on revisions to the EPA's Disadvantaged Business Enterprise (DBE) program. We are approving these revisions to improve the practical utility of the program, minimize burden, and clarify requirements that have been the subject of questions from recipients of EPA financial assistance and from disadvantaged business enterprises. These revisions are in accordance with the requirements of the Federal laws that govern the EPA DBE program.

**DATES:** This rule is effective on **[insert date 90 days after the date of publication in the Federal Register]** without further notice, unless EPA receives adverse comment by **[insert date 30 days after the date of publication in the Federal Register]**. If EPA receives adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OA-2006-0278, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once

submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Teree Henderson, Office of the Administrator, Office of Small Business Programs (mail code: 1230A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: 202-566-2222; fax number: 202-566-0548; email address: [henderson.teree@epa.gov](mailto:henderson.teree@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

BCRLF	Brownfields Cleanup Revolving Loan Fund
CWSRF	Clean Water State Revolving Fund
DWSRF	Drinking Water State Revolving Fund
EDWOSB	Economically Disadvantaged Woman Owned Small Business Program
DOT	Department of Transportation
SBA	Small Business Administration

DBE	Disadvantaged Business Enterprise
MBE	Minority Business Enterprise
WBE	Women's Business Enterprise
EPA	Environmental Protection Agency
OSBP	Office of Small Business Programs
SBVPS	Small Business Vendor Profile System

## **I. Why is EPA Using a Direct Final Rule?**

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comments. The actions are intended to improve the practical utility of the program, minimize burden, and clarify requirements that have been the subject of questions from recipients of EPA financial assistance and from disadvantaged business enterprises. However, in the “Proposed Rules” section of this Federal Register, we are publishing a separate document that will serve as the proposed rule to amend these regulations, if EPA receives significant adverse comments on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that this direct final rule will not take effect. We will address all public comments in any subsequent final rule based on the proposed rule.

## **II. Does This Action Apply to Me?**

If you are a recipient of an EPA financial assistance agreement; an entity receiving an identified loan under a financial assistance agreement capitalizing a revolving loan fund; or a minority-

owned, woman-owned, or small business, this rule may affect you. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### **III. What Should I Consider as I Prepare My Comments for EPA?**

A. *Submitting CBI.* Do not submit this information to EPA through [www.regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your

estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

#### **IV. Background**

The EPA's DBE Program is implemented through 40 CFR part 33, which was promulgated on March 26, 2008 (73 FR 15904) (hereafter referred to as "part 33"). The DBE program arose out of a review of affirmative action programs in the federal government following the Supreme Court's decision in *Adarand Constructors, Inc. v. Federico Pena, Secretary of Transportation*, 515 U.S. 200. The rule sets forth a narrowly tailored EPA program that serves the compelling government interest of remedying past and current racial discrimination, by establishing agency-wide DBE procurement objectives.

The DBE Program has four major components designed to ensure that minority and women-owned businesses have the opportunity to participate in procurements funded by EPA financial assistance agreements. These components are as follows:

- **DBE Certification:** The current DBE Program requires that in order to be counted as an MBE or WBE under an EPA financial assistance agreement, an entity will have to be certified as such. The EPA requires an MBE/WBE to first seek certification by a federal agency (e.g., the Small Business Administration (SBA), the Department of Transportation (DOT)), or by a State, locality, Indian Tribe, or independent private organization provided their applicable criteria match those under section 8(a) (5) and (6) of the Small Business Act and SBA's applicable 8(a) Business Development Program

regulations. The EPA then provides for certification of firms that cannot get certified by one of these entities. The EPA certification program provides an option for businesses that may not fall into a classification that is certified by other sources and provides for these businesses to participate in EPA's DBE program.

- **Negotiating Fair Share Goals:** The current DBE program requires all recipients of EPA financial assistance agreements to negotiate goals with the Agency for the utilization of MBEs/WBEs for procurements funded by EPA financial assistance agreements. The goals are based on disparity studies or availability analyses showing the availability of MBEs or WBEs in the financial assistance recipient's relevant geographic buying market. These goals do not operate as quotas.
- **Using the "Good Faith Efforts":** The "Good Faith Efforts" are measures implored by all EPA financial assistance agreement recipients to ensure that all DBEs have the opportunity to compete for procurements funded by EPA financial assistance dollars, and contain measures a financial assistance recipient may undertake to make procurements more open to MBEs and WBEs.
- **Reporting Accomplishments:** Under the current DBE program, recipients of EPA financial assistance agreements are required to report on their accomplishments with the program using EPA Form 5700-52A. Reporting is the tool the EPA uses to assess whether or not the program is effective and actually translating into increased opportunities for MBEs and WBEs.

When the final rule was promulgated, the EPA stated that the agency will "evaluate the propriety of the Disadvantaged Business Enterprise program in 7 years through subsequent rulemaking" (73 FR 15904). On August 13, 2013, OMB approved the information collection request

supporting the DBE Program with the following Terms of Clearance: “This ICR is approved for a period of 2 years until 2015, when EPA will undertake a comprehensive review of the Disadvantaged Business Enterprise rule.” The EPA Office of Small Business Programs (OSBP) has subsequently worked collaboratively with various program offices within the Agency and EPA regional DBE coordinators through various face-to-face meetings and conference calls from May-December 2014.

## **V. Summary of Changes**

The EPA is amending subparts A through E of part 33 to improve the practical utility of the EPA's DBE program and minimize the burden to affected entities. The EPA made three major revisions in the rule that will significantly impact the way the DBE program currently operates. These changes, which are described in detail in section IV of this preamble, include:

1. Establishing a self-certification platform for MBEs and WBEs. The EPA removed existing EPA certification requirements in subpart B of part 33 for firms that cannot be certified by another federal agency, and will instead allow qualified firms to self-certify as an MBE or WBE.
2. Updating the exemption threshold for fair share negotiations. The EPA increased the threshold for recipients exempted from negotiating fair share objectives in subpart D of part 33 from \$250,000 to \$1 million.
3. Revising the reporting frequency and applicability. The EPA revised subpart E of part 33 to change the frequency of DBE reporting to annual for all recipients, and limit reporting to financial assistance agreements with funds budgeted for procurements above the simplified acquisition threshold of \$150,000.

In addition to these changes, the EPA made minor changes to part 33 to minimize information

collection, clarify requirements, update references, and harmonize requirements with uniform administrative requirements published by the Office of Management and Budget (OMB).

## **VI. Detail and Rationale for Changes**

Additional details for the revisions to subparts A through E of part 33 and the rationale for these revisions are described respectively in the sections below.

### *A. Subpart A — General Provisions*

The EPA has made several changes to the General Provisions (subpart A) of part 33 to clarify the objectives, applicability, and implementation procedures of the DBE Program. The changes are intended primarily to clarify the requirements that apply to recipients and will not impose any new requirements or burdens that do not already exist.

First, we changed the first statement of DBE program objectives in 40 CFR 33.101(a) from: “To ensure nondiscrimination in the award of contracts under EPA assistance agreements” to: “To foster nondiscrimination in the award and administration of procurements under EPA financial assistance agreements”. The purpose of this change is to clarify that the program is not limited to particular types of procurements by a recipient of EPA financial assistance (e.g., only to contracts issued), but applies to all goods or services procured by a recipient under any type of financial instrument.

Second, we clarified to whom the requirements of part 33 apply. We changed the title of 40 CFR 33.102 to “To Whom Does This Part Apply?”. The EPA further amended the text to specify that part 33 applies to recipients of any of four different types of financial assistance agreements issued by the EPA, which are as follows: EPA financial assistance agreements, grants, or cooperative agreements used to capitalize revolving loan funds, Special Appropriations Act Projects, and subawards from an EPA recipient of any such funds. The revision still specifies

that part 33 does not apply to work that is conducted outside the United States or its territories and insular possessions, or that is not funded under an EPA financial assistance agreement.

Next, the EPA updated the definitions of terms in 40 CFR 33.103. One goal of the revisions to part 33 incorporates the principles established by 2 CFR part 200—Uniform Administrative Requirements, Cost Principles, And Audit Requirements for Federal Awards (hereafter referred to as “part 200”). Part 200 was finalized on October 9, 2015, and supersedes a number of OMB circulars governing the administration of federal financial awards. The reforms adopted by part 200 were intended (1) to streamline OMB guidance for the administration of financial awards to ease burden, and (2) to strengthen oversight of federal awards to increase efficiency and effectiveness of the awards. The rule applies both to federal agencies that issue financial assistance, encompassing the types of financial assistance provided by the EPA, and to recipients of the awards. We made minor amendments throughout Part 33 to incorporate these changes. In 40 CFR 33.104, we amended and added several definitions to be consistent with part 200, as well as update the introduction to the section to state that terms not defined in Part 33 will have the meaning given to them in part 200.

We also consolidated several existing definitions in 40 CFR 33.104. For example, we added the term “procurement” as “the acquisition of goods and services under a financial assistance agreement as defined by applicable regulations for the particular type of financial assistance received”. The term encompasses all forms of procurement and will replace the current definitions for “construction”, “equipment”, “services”, and “supplies” in subpart A and throughout part 33. To improve readability, we consolidated the definitions of all terms in Part 33 into subpart A by moving all the terms that are defined in 40 CFR part 33, subparts B, C, D, and E into 40 CFR 33.103. For example, we revised 40 CFR 33.202 and 33.303 to move the

definitions of “ownership or control,” “socially disadvantaged individual”, and “economically disadvantaged individual” to 40 CFR 33.103. Also, we amended certain definitions to be consistent with the rules of the Small Business Administration (13 CFR part 124) Department of Transportation (DOT) DBE Program, and Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. 7601 note), as well as to add minor clarifications.

The EPA also made changes to the provisions of 40 CFR 33.104 for recipients to obtain a waiver from any of the requirements of part 33. We made a substantive change that will place a 5 year limitation on the duration of each waiver and a recipient will need to reapply for the waiver at least 60 days prior to the expiration date. Previously, waivers were granted for “a reasonable duration” to be determined by the Director of the Office of Small and Disadvantaged Business Utilization, and could be terminated at any time at the Director’s discretion. Providing specific time frames for waiver duration ensures equity and consistency in issuing waivers across all recipients. The rule also changes the title of Director of the Office of Small and Disadvantaged Business Utilization to Director of Small Business Programs to reflect current EPA organizational structure. We made similar harmonizing changes throughout part 33 to update all references to the Office of Small and Disadvantaged Business Utilization (OSDBU) to the Office of Small Business Programs (OSBP).

The rule also revises 40 CFR 33.105, “What are the compliance and enforcement provisions of this part?” to more clearly parallel the applicable noncompliance remedies available to the EPA under regulations of the Office of Management and Budget for federal awards in 2 CFR 200.338. We changed a reference in 40 CFR 33.105 from 2 CFR part 200 to the more specific applicable reference of 2 CFR 200.338, and to edit the list of examples of remedial actions in 40 CFR 33.105 to be identical to the examples provided in 2 CFR 200.338. The EPA incorporated a new

requirement into 40 CFR 33.107 for recordkeeping and records access. We incorporated by reference the recordkeeping and records access provisions of 2 CFR 200.33 through 200.337. These provisions, in general, require recipients of federal awards to retain all records that are relevant to the award for a period of 3 years and to allow the government access to the records for purposes of auditing. These changes are part of the EPA's effort to update part 33 to incorporate the principles established by part 200, as described in section IV.1 of this preamble. Finally, we revised appendix A to part 33. First, we revised appendix A from an appendix of part 33 (following subpart E) to an appendix of the General Provisions. The term and condition of appendix A is a reference of the requirements of 40 CFR 33.106; therefore, including the term and condition as an appendix of subpart A improves the readability of the subpart. We also amended appendix A to add the additional stipulation that any procurement contract signed by a recipient must include the contract provisions of 2 CFR part 200, appendix II. Appendix II clarifies all of the contract provisions that are required by other applicable statutes and regulations for contracts issued by recipients of federal financial assistance. The requirement to comply with appendix II is not a new requirement but adding this stipulation in appendix A to part 33 makes the requirement clearer to recipients and reduces the risk of unintentional noncompliance.

#### *B. Subpart B — Certification*

The rule will implement several significant changes to the existing certification requirements of subpart B of part 33. First, the EPA revised the certification requirements of 40 CFR 33.204 through 33.211 to revise the EPA's existing certification process for firms that cannot be certified by another federal agency. Under the current requirements of part 33, the EPA requires an MBE or WBE to first seek certification by a federal agency (e.g., the Small Business

Administration (SBA), the Department of Transportation (DOT)), or by a State, locality, Indian Tribe, or independent private organization (provided their applicable criteria match those under section 8(a)(5) and (6) of the Small Business Act and SBA's applicable 8(a) Business Development Program regulations). The EPA only considers certifying firms that cannot get certified by one of these entities. The EPA has previously required firms to first seek certification from other sources because an EPA certification is limited in that it is only accepted for opportunities funded by EPA financial assistance agreements. Conversely, certifications from other sources are beneficial for the business entity because they have broader applications. In implementing the DBE program over the past seven years, the EPA has received applications from various entities requesting EPA certification of their MBE/WBE status. For an EPA certification, the current rule requires that entities submit a paper application with evidence demonstrating that the entity meets the requirements of 40 CFR 33.202 and 33.203 (i.e., the entity is owned or controlled by one or more individuals claiming disadvantaged status under the EPA's 8 percent statute or owned and controlled by one or more individuals claiming disadvantaged status under the EPA's 10 percent statute), along with evidence regarding the disadvantaged status of such individuals and documentation of a denial of certification from another certifying entity. The application is then evaluated according to by the EPA within 30 days for approval. A review of this process, including the applications that the EPA has approved or denied for certification, determined that the overall demand for EPA certification has been nominal. In addition, the majority of firms seeking an EPA certification under 40 CFR 33.205 were already certified under other programs, and further EPA certification was unnecessary. Further, the current process, including the period for EPA review, is resource intensive and extends the time in which a facility receives its certification. For these reasons, the EPA removed

the existing EPA certification requirements in 40 CFR 33.205 and will no longer process paper applications.

In lieu of the current application and evaluation requirements, revised 40 CFR 33.204 and 33.205 to accept and implement a self-certification process for firms who are not otherwise certified by another entity. The requirements will allow qualified firms to self-certify under the EPA's DBE program as an MBE or WBE, using the EPA's Small Business Vendor Profile System (SBVPS). Under this approach, firms seeking an EPA certification will register in the online SBVPS.

Registration in the SBVPS will require the firm to provide their firm name and contact information, federal tax ID, DUNS no., type of business, date of start, annual sales, company size and classification, ethnicity, any other prior certifications. Firms will then self-attest to meeting the eligibility requirements set forth in 40 CFR 33.202 and 33.203. The self-certification provided through the SBVPS will be legally-binding. This approach, which is consistent with the certification requirements of other federal agencies including the SBA, does not require submittal of additional information, or require EPA review of an application. However, the EPA could request entities to provide evidence that they meet the eligibility requirements at any time. These self-certification requirements will reduce burden on firms by removing the current paper application process and decreasing the time spent by entities acquiring certification. These changes will also streamline agency activities related to maintaining forms, conducting reviews, and responding to applicants, resulting in an overall burden reduction.

The approach will no longer require businesses to first seek certification from other entities before requesting EPA DBE certification. All businesses who meet the EPA DBE program certification requirements will be able to participate in self-certifying. The EPA will still accept certifications from other sources, including a federal agency, state, locality, Indian Tribe, or

independent private organization, provided their standards for certification meet or exceed the EPA's. The EPA DBE self-certification will also remain only applicable to opportunities funded by EPA financial assistance agreements; 40 CFR 33.405 will clarify that the EPA's DBE certification will be not recognized by other federal, state or local organizations. Therefore, the EPA will continue to encourage businesses to obtain certifications from these sources. The self-certification approach will also provide for proof of certification for such facilities under EPA's DBE program. We revised 40 CFR 33.206 to provide for firms who self-certify through the SBVPS to be listed on the EPA's SBVPS through the OBSP website. The list will be publically available and provide assurance to recipients of EPA funding that the entities listed are certified and eligible for participation.

Similar to the existing EPA certification, EPA self-certifications under this new approach will be valid for a period of three years. We revised 40 CFR 33.207 to specify that this period will begin from the date an entity is self-certified in the EPA's SBVPS. The SBVPS database will automatically purge data every three years, therefore firms will be required to re-register every three years to maintain their MBE or WBE status. Because facilities will be responsible for their registration and are self-certifying, we removed the requirements of 40 CFR 33.207, 33.209, and 33.211, which apply to re-application, re-evaluation, and appeal of EPA determinations for certified entities. We also revised 40 CFR 33.210 to clarify that facilities are responsible for keeping the EPA informed of any changes which may affect the entity's certification, including requiring the entity to remove its self-certification from the SBVPS database within 30 days of any changes to its eligibility status. This timeline is consistent with current requirements.

The EPA also made several minor revisions to subpart B of Part 33 that will clarify existing requirements or provide for additional flexibility for affected entities. As discussed in section

IV.1 of this preamble, we consolidated the definitions for “ownership or control,” “socially disadvantaged individual”, and “economically disadvantaged individual” in 40 CFR 33.202 and 33.203 under subpart A of part 33. We removed the definitions for “HBCU” and “Women” in paragraphs (d) and (e) of 40 CFR 33.203; the definition of “HBCU” is already included in 40 CFR 33.103, and a specific definition for “Women” is no longer necessary as women are included within the definitions for “socially disadvantaged individual” and “economically disadvantaged individual.”

We made several clarifications to 40 CFR 33.204, including clarifying the content by revising the title to read “What certifications are acceptable for establishing MBE or WBE status under the EPA DBE Program?” We also clarified the rule references for those outside certifications currently accepted by the EPA (e.g., the SBA’s 8(a) Business Development Program or its Small Disadvantaged Business (SDB) Program), and adding a reference to the Economically Disadvantaged Woman Owned Small Business (EDWOSB) Program (13 CFR part 127, subpart B). The EDWOSB was established on Oct. 7, 2010 (75 FR 62282) and provides certification requirements that meet or exceed the EPA’s standards; the change will benefit entities by providing an additional certification option. Finally, we are clarifying that the certifications under the United States Department of Transportation (DOT) Participation by Disadvantaged Business Enterprises in DOT Programs are acceptable only with U.S. citizenship. The change clarifies that the existing U.S. citizenship requirement under Part 33 applies to these certifications.

#### *C. Subpart C — Good Faith Efforts*

The EPA made several changes to the Good Faith Efforts requirements of subpart C of 40 CFR part 33 to clarify the requirements. The revisions will not impose any new requirements or

burdens, but primarily reorganizes the subpart in a more logical order to make the goals and obligations more apparent. We made one change to reduce burden.

We made several changes to 40 CFR 33.301. First, we replaced the introduction to 40 CFR 33.301 (“What does this subpart require?”) with a statement of purpose to clarify that good faith efforts are methods used by EPA recipients to ensure that DBEs have the opportunity to compete for procurements funded by EPA financial assistance dollars. A new paragraph (h) will consolidate in one place and clarify the actions that constitute good faith efforts. Paragraph (h) is a result of reorganization and will not change any existing requirements. For example, we codified that recipients must use the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations, when feasible, when conducting the good faith efforts. This requirement is based on the existing good faith efforts, as outlined in the July 24, 2003 proposed DBE rule (68 FR 43824). We made one minor harmonizing change to 40 CFR 33.408 for consistency.

The rule will also add several new paragraphs to 40 CFR 33.301 to clarify the administrative requirements for meeting the good faith efforts. First, we are adding new text in paragraphs (b) and (c) to clarify that no recipients are exempted from the good faith efforts requirements, including recipients that are exempt from the fair share objectives of 40 CFR part 33, subpart D. We also added a new paragraph (e) to clarify that recipients are required to ensure that all sub-recipients/prime contractors meet these requirements. These stipulations are inferred in the current provisions but were added to 40 CFR 33.301 for clarity. The changes to 40 CFR 33.301 will also clarify that subpart C does not negate the post federal award requirements of part 200. We also clarified in 40 CFR 33.301(d) that recipients must retain records of the methods used to

adhere to good faith efforts. This provision already is required by the existing recordkeeping requirements of 40 CFR 33.501(a), but was added to 40 CFR 33.301(d) for clarity and better organizational placement. In a related change, we added a new paragraph (i) to clarify what constitutes non-compliance with subpart C. Paragraph (i) specifies that recipients that fail to meet all the fair share goals will not be penalized if they document the circumstances that prohibited full execution of each requirement, but that failure to retain proper documentation may constitute noncompliance.

Next, for 40 CFR 33.302 (“Are there any additional contract administration requirements?”), we reduced a reporting requirement by eliminating Form 6100-2. Under the current rule, prime contractors are required to provide Form 6100-2 to DBE subcontractors. Form 6100-2 is an optional form that gives a DBE subcontractor the opportunity to inform the EPA about the work received and/or report any concerns regarding the EPA-funded project (e.g., termination by prime contractor, late payments, et al.). We are eliminating this form because the EPA has no legal authority or other leverage to intervene on behalf of the DBE to resolve any such problems. Eliminating this form will not hinder effective implementation of the program, but will reduce burden on recipients, prime contractors, DBEs, and the EPA. We also added a stipulation to 40 CFR 33.302 that failure to include EPA Forms 6100-3 and 6100-4 may constitute non-responsiveness and that the recipient may consider this non-responsiveness in evaluating a prime contractor’s proposal. Forms 6100-3 and 6100-4 document the intended degree of DBE utilization under any prime contract issued by the recipient. This change is intended to provide clarification of compliance under subpart C and does not change any existing requirements. To ensure that a recipient is aware of all required contracting provisions, text was added to point out that all procurement contracts awarded by a recipient must contain the provisions specified in 2

CFR part 200, appendix II, as applicable.

We made one editorial correction to 40 CFR 33.303 (“Are there special rules for loans under EPA financial assistance agreements?”) by changing the clause beginning with “such as...” to “including but not limited to...” so that the clause clarifies but does not limit applicability of the section.

Finally, we clarified 40 CFR 33.304 to more accurately reflect the contents of the provisions and to clarify that a Native American recipient includes a consortium. The title will be “What special rules apply to a Native American (either as an individual, organization, Tribe or Tribal Government or consortium) Recipient or Prime Contractor when following the six good faith efforts?” We also made a harmonizing change to 40 CFR 33.304(a).

#### *D. Subpart D — Fair Share Objectives*

The EPA made revisions to subpart D of part 33 to revise the requirements for recipients of EPA financial assistance agreements to negotiate fair share objectives for MBE and WBE participation. The changes will generally reduce burden for recipients by reducing the number of recipients required to negotiate fair share objectives or revising the information that must be submitted by recipients. We also provided additional clarifications and harmonizing changes that will not impose any new requirements or burdens that do not already exist.

First, the EPA revised 40 CFR 33.401 and 33.402 to clarify that in addition to negotiating its own fair share objectives, a recipient may use the approved fair share objective of another recipient with the same or similar relevant geographic buying market, purchasing the same or similar items. The EPA made one related harmonizing change to 40 CFR 33.405(a). These amendments harmonizes the requirements for recipients of EPA financial assistance agreements and financial agreements to capitalize revolving loan funds with the existing requirements of 40

CFR 33.405(b)(3), which allow recipients to use the fair share objectives of another recipient when determining a base figure for the relative availability of MBEs and WBEs. The EPA also revised 40 CFR 33.402 to clarify that for loan procurements that will occur over more than one year, the recipient should apply the fair share objectives in place to the year in which the procurement action occurs. Previously, the recipient could choose to apply the fair share objective in place either for the year in which the identified loan was awarded or for the year in which the procurement action occurred. These two options resulted in frequent questions from recipients; the change implements the former option and provides a consistent approach for all recipients.

We made one minor revision to 40 CFR 33.403 (“What is a fair share objective?”) to remove the categories of construction, equipment, services and supplies, consistent with the changes to the definition of “procurement” discussed in section IV.1 of this preamble.

Next, we revised the timeline for submittal of proposed fair share objectives and the EPA’s subsequent review schedule. Specifically, we made revisions to 40 CFR 33.404 to shorten the time for recipients to submit their proposed MBE and WBE fair share objectives from 120 days to 90 days after acceptance of a financial assistance award. Because MBE and WBE fair share objectives must be agreed upon by the recipient and EPA before funds may be expended for procurement, the EPA has determined that recipients must submit their fair share objectives sooner in order to ensure that projects are commenced in a timely manner. These revisions will affect only those recipients that exceed the exemption threshold in 40 CFR 33.411. We also revised the timeframe for the EPA to respond in writing to the recipient's submission from 30 days to 45. We included these extra 15 days because the agency typically reviews a high number of applicants at one time. This time frame still allows for projects to commence earlier, as the

rule provides that if EPA does not provide a response within 45 days then the fair share objectives submitted by the recipient are automatically agreed upon.

We made two substantive revisions to 40 CFR 33.405, which provides for how recipients must determine MBE and WBE fair share objectives. First, we made revisions to 40 CFR 33.405(a) to require recipients to propose two separate MBE and WBE fair share objectives. Under the current rule, recipients are required to determine separate MBE and WBE fair share objectives for each of the four procurement categories, with the option to combine the four categories into one weighted objective. The revision is a harmonizing change with the changes to the definition of “procurement” discussed in section IV.1 of this preamble, which removes the four procurement categories from part 33. The revisions will significantly reduce the burden required of recipients by reducing the number of fair share objectives that must be determined. We made related minor harmonizing changes to 40 CFR 33.405(b)(1) and (2). Additionally, we made revisions to 40 CFR 33.405(c) to clearly state the applicable noncompliance remedies available to the EPA for recipients that fail to determine and implement fair share objectives. The rule references the applicable remedies under OMB regulations for federal awards in 2 CFR 200.338, including the specific applicable reference of 2 CFR 200.338, and the list of examples provided in 2 CFR 200.338. The EPA made the same changes to 40 CFR 33.410 to clarify the remedial actions that may be taken when a recipient fails to meet the requirements of subpart D.

The EPA made amendments to 40 CFR 33.407 to revise the length of the period that a recipient’s negotiated fair share objectives are effective from 3 fiscal years to 5 fiscal years. The increase reflects the typical award period for grants, which are 3 to 5 years in length. By increasing the period for which fair share objectives are effective to five years, the change eliminates the possibility of a grant recipient having to renegotiate its fair share objectives midway through a

project. This revision reduces the burden on recipients by reducing the frequency and time needed to revise their objectives.

We made a significant change to 40 CFR 33.411 to revise the exemption threshold for recipients required to meet the fair share objectives of subpart D. Currently, recipients of any single EPA financial assistance agreement in the amount of \$250,000 or less or recipients of more than one EPA financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year is not required to apply the fair share objective requirements. In its implementation of the DBE program, the EPA has received feedback from stakeholders receiving smaller financial assistance awards regarding the burden associated with collecting data for the determination of fair share objectives. Typically, the recipients of funding awards totaling in an amount lesser than \$1 million are smaller entities who have very limited resources and personnel available to collect directory and census bureau data, perform disparity studies, develop alternative methods, or collect evidence from related fields or recipients to calculate the fair share goals. Given these limitations, such recipients have expressed difficulty in meeting the fair share objectives in a timely manner to guarantee funding of the assistance agreement. In such cases, these recipients have been unable to take advantage of the awarded funds and experienced delays or failures in completing EPA projects. In order to reduce the burden for these recipients and ensure that these smaller entities are able to expend funds under their awarded financial assistance agreement, we revised the exemption threshold from \$250,000 to \$1 million. The EPA identified a new threshold of \$1 million based on a review of funding awarded to all entities during implementation of the program. Through this review, the EPA determined that the majority of funding award by the EPA (over 90 percent) is allotted to larger entities who received financial assistance agreements of greater than \$1 million or a combination of financial assistance

agreements whose total exceeds \$1 million. Therefore, the EPA determined that a \$1 million threshold will provide relief for smaller entities while ensuring that those recipients that receive the majority of funding from financial assistance agreements awarded by the EPA will continue to develop fair share objectives. These larger entities typically have the resources and personnel to conduct the data gathering steps required for development of the fair share goals. As such, the new threshold will ensure that for the majority of financial assistance agreements awarded by the EPA, recipients will continue to set goals for MBE and WBE participation in procurement.

The EPA made additional minor revisions to 40 CFR 33.411. We revised 40 CFR 33.411(b) to clarify that the recipients of loans other than loans from the Clean Water State Revolving Fund (CWSRF) Program, Drinking Water State Revolving Fund (DWSRF) Program, and Brownfields Cleanup Revolving Loan Fund (BCRLF) Program who are below the exemption threshold of \$1 million are not required to meet the fair share objective requirements of subpart D. We also revised 40 CFR 33.411(c) to clarify the reference for Performance Partnership Grants (PPGs) and to consolidate the requirements of 40 CFR 33.412. We removed 40 CFR 33.412 and revised 40 CFR 33.411 to include all exemptions to the fair share objectives in one place. Finally, we revised the term “grant” to “assistance agreement” in 40 CFR 33.411(c) to clarify that the exemptions apply to recipients of annual assistance agreements other than grants.

#### *E. Subpart E — Recordkeeping and Reporting*

The EPA made one significant change and several minor clarifications to the recordkeeping and reporting requirements of subpart E of part 33. Notably, we revised the reporting requirements of 40 CFR 33.502 to incorporate a Class Deviation previously issued by the EPA to grant exceptions from the reporting requirements of Part 33 (hereafter referred to as the “Deviation”). The Deviation changed the frequency of DBE reporting in 40 CFR 33.502 to annual for all

recipients, and limited reporting to financial assistance agreements with funds budgeted for procurements above the simplified acquisition threshold. Specifically, the Deviation established that recipients, including recipients of financial assistance agreements that capitalize revolving loan programs, are required to report MBE/WBE participation annually on EPA Form 5700-52A when one or more of the following conditions are met: (1) there are funds budgeted for procurements, including funds budgeted for direct procurement by the recipient or procurement under sub-awards or loans in the “Other” category that exceed the simplified acquisition threshold amount of \$150,000; (2) if at the time of award the budgeted funds for procurement exceed \$150,000, but actual expenditures fall below, or; (3) if subsequent amendments and funding cause the total amount of procurement to surpass the \$150,000 threshold. The Deviation also directed that where reporting is required, all procurement actions are reportable, not just the portion which exceeds \$150,000. Reporting is not required if at the time of award, funds budgeted for procurements are less than or equal to \$150,000 and are maintained below the threshold. The changes established in the Deviation have been effective since December 4, 2014, and are only being codified in this rule. We also added a provision to 40 CFR 33.502 to clarify that reports must be submitted by October 30th of each fiscal year, or 30 days after the end of the project period, whichever comes first. This revision is consistent with the reporting due date(s) established in the terms and conditions for assistance agreement recipients revised February 5, 2015. The change will incorporate terms that shortened the submission date from 90 days after the end of the project period to 30 days. The EPA previously incorporated these changes into existing agreements to ensure that final reports were received in a timely fashion to facilitate the close out process. The EPA cannot close out an assistance agreement until the final report is received. The changes codifies these terms and conditions for all assistance agreements for

which reporting is required.

We made only minor revisions to 40 CFR 33.501. We revised 40 CFR 33.501(a) to change the term “grant” to “assistance agreement” to clarify that recipients of annual assistance agreements other than grants must maintain a bidder’s list. We also removed the requirement for recipients to include the mailing address of any prime- or subcontractors in the bidder’s list; a mailing address is no longer necessary because the information in the bidder’s list is only handled electronically. Finally, revised 40 CFR 33.501(c) to change the phrase “a recipient under the CWSRF, DWSRF, or BCRLF Program” to “a recipient under the CWSRF, DWSRF, BCRLF, or other identified loan program” to clarify that the requirements are not limited to recipients of the programs currently listed in the rule; these changes are consistent with the changes to 40 CFR 33.303 and 40 CFR 33.411(b) discussed in sections IV.A and IV.D of this preamble, respectively.

Finally, we made one minor revision to 40 CFR 33.503 to clarify when reporting amounts of MBE and WBE participation as a percentage of total financial assistance agreement project procurement cost, recipients should only report funds used for procurements. This change is consistent with the existing requirements.

## **VII. Statutory and Executive Order Reviews**

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:*

#### *Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

#### *B. Paperwork Reduction Act*

The information collection activities in this rule will be submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR)

document that the EPA prepared has been assigned EPA ICR number 2536.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

Information requested as a result of the revisions relate to (1) the Contract Administration Forms which are required if there are DBE subcontractors involved in a procurement under 40 CFR 33.302 (d) and (e) (formerly 40 CFR 33.302(f) and (g)), (2) the EPA DBE Self Certification process, and (3) fair share objectives required of certain recipients of EPA financial assistance.

The information that will be collected allows EPA to evaluate and ensure the effectiveness of, and compliance with, the program's requirements. Information gathered that may reasonably be regarded as proprietary or other confidential business information will be safeguarded from disclosure to unauthorized persons, consistent with applicable federal, state and local law. EPA has regulations concerning confidential business information. See 40 CFR part 2, subpart B.

*Respondents/affected entities:* Recipients of EPA financial assistance agreements and entities in the fields of construction, equipment, services and supplies who are intent on being prime contractors or subcontractors on EPA funded projects.

*Respondent's obligation to respond:* Contract Administration: Pursuant to 40 CFR 33.302, a recipient must require its prime contractor to have its DBE subcontractors complete EPA Form 6100-3—DBE Program Subcontractor Performance Form as part of the prime contractor's bid or proposal package. Furthermore, a recipient must require its prime contractor to complete and submit EPA Form 6100-4—DBE Program Subcontractor Utilization Form as part of the prime contractor's bid or proposal package.

Certification: Obtaining EPA DBE Certification is voluntary, however, in order to qualify and participate as an MBE or WBE prime or subcontractor for EPA recipients under EPA's DBE

Program, an entity must be properly certified as detailed in 40 CFR 33.201.

Fair Share Negotiations: It is required that all financial assistance recipients, unless exempt under 40 CFR 33.411, negotiate objectives/goals for MBE/WBE utilization pursuant to 40 CFR 33.401.

*Estimated number of respondents:* 2,132

*Frequency of response:* Contract Administration: Once during bid or proposal. Certification: Once during initial DBE certification and every three years as needed for re-certification. Fair Share Negotiations: Once Every Five Years.

*Total estimated burden:* 2,973 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* \$92,840 (per year), includes \$0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the Federal Register and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

This is rule being published as a direct final action. A public comment period prior to this publication was not required.

### *C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves

regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action will improve the practical utility of the EPA's DBE program and minimize the burden to small entities. We have therefore concluded that this action will relieve regulatory burden for all directly regulated small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The costs involved in this action are imposed only by conditions of federal assistance. UMRA excludes from the definition[s] of “federal intergovernmental mandate” duties that arise from conditions of federal assistance. Additionally, this action imposes no enforceable duty on any state, local or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Because this rule conditions the use of federal assistance, it will not impose substantial direct compliance costs on State and local governments.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. The amendments generally reduce the burden and compliance costs associated with 40 CFR part 33.

*G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. The EPA made this determination because this rule does not affect the level of protection provided to human health or the environment.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

### **List of Subjects in 40 CFR Part 33**

Environmental protection, Grant programs.

Dated: July 15, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency is amending title 40, chapter I, of the Code of Federal Regulations as follows:

**PART 33—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PROGRAMS**

1. The authority citation for part 33 continues to read as follows:

**Authority:** 15 U.S.C. 637 note; 42 U.S.C. 4370d, 7601 note, 9605(f); E.O. 11625, 36 FR 19967, 3 CFR, 1971 Comp., p. 213; E.O. 12138, 49 FR 29637, 3 CFR, 1979 Comp., p. 393; E.O. 12432, 48 FR 32551, 3 CFR, 1983 Comp., p. 198, 2 CFR part 200.

**Subpart A—General Provision**

2. Section 33.101 is amended by revising paragraph (a) to read as follows:

**§33.101 What are the objectives of this part?**

\* \* \* \* \*

(a) To foster nondiscrimination in the award and administration of procurements under EPA financial assistance agreements. To that end, implementation of this rule with respect to grantees, sub-grantees, loan recipients, prime contractors, or subcontractors in particular States or locales—notably those where there is no apparent history of relevant discrimination—must comply with equal protection standards at that level, apart from the EPA disadvantaged business enterprise (DBE) Rule's constitutional compliance as a national matter;

\* \* \* \* \*

3. Section 33.102 is revised to read as follows:

**§33.102 To whom does this part apply?**

(a) If you are a recipient or prime contractor of any of the following types of funds, this part applies to you:

- (1) An EPA financial assistance agreement.

(2) Grants or cooperative agreements used to capitalize revolving loan funds, including, but not limited to, the Clean Water State Revolving Loan Fund (CWSRF) Program under Title VI of the Clean Water Act, as amended, 33 U.S.C. 1381 *et seq.*, the Drinking Water State Revolving Fund (DWSRF) Program under section 1452 of the Safe Drinking Water Act, 42 U.S.C. 300j-12, and the Brownfields Cleanup Revolving Loan Fund (BCRLF) Program under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9604.

(3) Special Appropriation Act Projects (SAAP) funding.

(4) A subaward from an EPA recipient to carry out the project or program under the Federal award.

(b) If you are letting a contract, and that contract is to be performed entirely outside the United States or its territories and insular possessions, this part does not apply to the contract.

(c) If you are letting a contract that is not being funded under an EPA financial assistance agreement or not being funded as part of the required match for an EPA financial assistance agreement, this part does not apply to the contract.

4. Section 33.103 is amended by:

a. Revising the introductory text.

b. Adding definitions for “Contract,” “Contractor,” “Control,” “Economically disadvantaged individual,” “Expenditures,” “Federal award,” “Goods and services,” “Ownership,” “Procurement,” “Relevant geographic market,” “Socially disadvantaged individual,” “Subaward,” “Subcontract,” “Subcontractor,” “Subrecipient,” and “Territories and Insular Possessions” in alphabetical order.

c. Revising the definitions of “Availability analysis,” “Disadvantaged business enterprise (DBE),” “Disparity study,” “Identified loan,” “Recipient,” “United States,” and “Women’s

business enterprise.”

d. Removing the definitions for “Construction,” “Equipment,” “Insular area,” “Services,” and “Supplies.”

The revisions and additions read as follows:

**§33.103 What do the terms in this part mean?**

Terms not defined below shall have the meaning given to them in 2 CFR 200.1 as applicable. As used in this part:

*Availability analysis* means documentation of the availability of minority business enterprises (MBEs) and women's business enterprises (WBEs), that provide particular goods and services in a relevant geographic market, in relation to the total number of firms available in that area that provide the same goods or services.

\* \* \* \* \*

*Contract* means a legal instrument by which a non-Federal entity purchases goods or services needed to carry out the project or program under a Federal award. The term as used in this part does not include a legal instrument, even if the non-Federal entity considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward (see *Subaward* as defined this section).

*Contractor* means an entity that receives a contract as defined in this section.

*Control* means both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations as described in 13 CFR 124.106.

\* \* \* \* \*

*Disadvantaged business enterprise (DBE)* means an entity that is at least 51% owned or controlled by a socially and economically disadvantaged U.S citizen as described by Public Law

102-389 (42 U.S.C. 4370d) or an entity owned and controlled by a socially and economically disadvantaged individual as described by Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. 7601 note); a Small Business Enterprise (SBE); a Small Business in a Rural Area (SBRA); or a Labor Surplus Area Firm (LSAF), a Historically Underutilized Business (HUB) Zone Small Business Concern, or a concern under a successor program.

*Disparity study* means an analysis of whether a disparity, or differences, exists between the number of MBEs and WBEs within the same industries in a relevant geographic market that are available to participate in EPA financial assistance agreements, and those that actually participate.

*Economically disadvantaged individual* means a socially disadvantaged individual whose ability to compete in the free enterprise system is impaired due to diminished capital and credit opportunities, as compared to others in the same business area who are not socially disadvantaged and as further defined by section 8(a)(6) of the Small Business Act (15 U.S.C. 637(a)(6)) and its implementing regulations (13 CFR 124.104). (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations). Under EPA's DBE Program, an individual claiming disadvantaged status must have an initial and continued personal net worth of less than or equal to the prevailing Department of Transportation (DOT) DBE Program economic disadvantaged threshold as described in 49 CFR part 26, subpart D.

*Expenditures* means charges made by a non-Federal entity to a project or program for which a Federal award was received. The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(1) For reports prepared on a cash basis, expenditures are the sum of:

- (i) Cash disbursements for direct charges for property and services;
  - (ii) The amount of indirect expense charged;
  - (iii) The value of third-party in-kind contributions applied; and
  - (iv) The amount of cash advance payments and payments made to subrecipients.
- (2) For reports prepared on an accrual basis, expenditures are the sum of:
- (i) Cash disbursements for direct charges for property and services;
  - (ii) The amount of indirect expense incurred;
  - (iii) The value of third-party in-kind contributions applied; and
  - (iv) The net increase or decrease in the amounts owed by the non-Federal entity for goods and other property received; services performed by employees, contractors, subrecipients, and other payees; and programs for which no current services or performance are required, such as annuities, insurance claims, or other benefit payments.

\* \* \* \* \*

*Federal award* has either of the following meanings, as applicable:

- (1) The Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in 2 CFR 200.101 Applicability; or the cost-reimbursement contract under the Federal Acquisition Regulations that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in 2 CFR 200.101 (Applicability).
- (2) The instrument setting forth the terms and conditions of a grant agreement, cooperative agreement, other agreement for assistance covered in paragraph (b) of 2 CFR 200.40 (Federal financial assistance), or the cost-reimbursement contract awarded under the Federal Acquisition Regulations.

(3) Federal award does not include other contracts that a Federal agency uses to buy goods or services from a contractor or a contract to operate Federal Government owned, contractor operated facilities (GOCOs).

\* \* \* \* \*

*Goods and services* means tangible consumable items and tasks performed by individuals.

\* \* \* \* \*

*Identified loan* means a loan project or set-aside activity receiving assistance from a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, that:

(1) In the case of the CWSRF Program, is a project funded from amounts equal to the capitalization grant;

(2) In the case of the DWSRF Program, is a loan project or set-aside activity funded from amounts up to the amount of the capitalization grant;

(3) In the case of the BCRLF Program, is a project that has been funded with EPA financial assistance; or

(4) In the case of other loan programs, is a project that has been funded with EPA financial assistance.

\* \* \* \* \*

*Ownership* means at least 51 percent of an enterprise is unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs) as described in 13 CFR 124.105. See 13 CFR 124.3 for definition of unconditional ownership; and 13 CFR 124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns

owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations.

*Procurement* means the acquisition of goods and services under a financial assistance agreement as defined by applicable regulations for the particular type of financial assistance received.

*Recipient* means a non-Federal entity that receives an EPA financial assistance agreement or is a sub-recipient of such agreement, including and not limited to loan recipients under the Clean Water State Revolving Fund Program, Drinking Water State Revolving Fund Program, and the Brownfields Cleanup Revolving Loan Fund Program.

*Relevant geographic market* means is the area of solicitation for a procurement as determined by the recipient which may include where the recipient has historically done business and/or plans to do business as it relates to new markets.

\* \* \* \* \*

*Socially disadvantaged individual* means a person who has been subjected to racial or ethnic prejudice or cultural bias because of his or her identity as a member of a group without regard to his or her individual qualities and as further defined by the implementing regulations of section 8(a)(5) of the Small Business Act (15 U.S.C. 637(a)(5); 13 CFR 124.103; see also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

*Subaward* means an award provided by an EPA financial assistance agreement recipient to a subrecipient for the subrecipient to carry out part of an EPA award received by the recipient. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

*Subcontract* means an agreement between an EPA financial assistance agreement's prime contractor and a subcontractor to provide goods and services.

*Subcontractor* means an entity engaged by an EPA financial assistance agreement's prime contractor to provide good and services.

*Subrecipient* means a non-Federal entity that receives a subaward from an EPA recipient to carry out part of an EPA program; but does not include an individual that is a beneficiary of such program.

*Territories and Insular Possessions* means any type of political division that is directly overseen by the United States as described in U.S. Code: Title 48.

*United States* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and any other territories and possessions of the United States.

*Women's business enterprise (WBE)* means a business concern which is at least 51% owned or controlled by women for purposes of EPA's 8% statute or a business concern which is at least 51% owned and controlled by women for purposes for EPA's 10% statute. Determination of ownership by a married woman in a community property jurisdiction will not be affected by her husband's 50 percent interest in her share. Similarly, a business concern that is more than 50 percent owned by a married man will not become a qualified WBE by virtue of his wife's 50 percent interest in his share.

5. Section 33.104 is amended by:

- a. Revising paragraphs (a), (c) introductory text, and (c)(2) and (3).
- b. Adding paragraph (c)(4).
- c. Removing paragraph (d).

The revisions and addition read as follows:

**§33.104 May recipients apply for a waiver from the requirements of this part?**

(a) A recipient may apply for a waiver from any of the requirements of this part that are not specifically based on a statute or Executive Order, by submitting a written request to the Director of the Office of Small Business Programs (OSBP).

\* \* \* \* \*

(c) The OSBP Director has the authority to approve a recipient's request. If the OSBP Director grants a recipient's request, the recipient may administer its program as provided in the request, subject to the following conditions:

\* \* \* \* \*

(2) There is a five year limitation on the duration of the recipient's modified program. Should it be necessary to extend a waiver beyond the five year period, recipients are required to submit a new waiver request at least 60 days prior to the modified program's expiration date. Should the recipient fail to submit a new waiver request prior to the modified program's expiration date, the recipient will be required to comply with the provisions of this part and all terms agreed upon as a condition of the waiver will expire; and

(3) Any other conditions the OSBP Director makes on the grant of the waiver.

(4) The OSBP Director may end a program waiver at any time upon notice to the recipient and require a recipient to comply with the provisions of this part.

6. Section 33.105 is revised to read as follows:

**§33.105 What are the compliance and enforcement provisions of this part?**

If a recipient fails to comply with any of the requirements of this part, EPA may take remedial action under 2 CFR 200.338, as appropriate, or any other action authorized by law, including, but not limited to, enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act

of 1986 (31 U.S.C. 3801 *et seq.*). Examples of the remedial actions include, but are not limited to:

- (a) Temporarily withholding cash payments pending correction of the deficiency by the recipient or more severe enforcement action by EPA;
- (b) Disallowing (that is, denying both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance;
- (c) Wholly or partly suspending or terminating the EPA award;
- (d) Initiating suspension or debarment proceedings as authorized under 2 CFR part 180 and EPA regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by EPA);
- (e) Withholding further awards for the project or program; and
- (f) Taking other remedies that may be legally available.

7. Section 33.107 is amended by:

- a. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively.
- b. Adding new paragraph (b).

The addition reads as follows:

**§33.107 What are the rules governing availability of records, cooperation, and intimidation and retaliation?**

\* \* \* \* \*

(b) *Retention requirements and access for records.* Recipients are required to adhere to the requirements set forth in 2 CFR 200.333 through 200.337 for record retention and access to records requirements.

\* \* \* \* \*

8. Appendix A is added to subpart A of part 33 to read as follows:

**Appendix A to Subpart A of Part 33—Term and Condition**

Each procurement contract signed by an EPA financial assistance agreement recipient or subrecipient, including those for an identified loan under an EPA financial assistance agreement capitalizing a revolving loan fund, must include provisions under 2 CFR part 200, appendix II, as applicable, as well as the following term and condition:

The contractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 40 CFR part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or other legally available remedies.

**Subpart B—Certification**

9. Section 33.202 is revised to read as follows:

**§ 33.202 How does an entity qualify as an MBE or WBE under EPA's 8% statute?**

To qualify as an MBE or WBE under EPA's 8% statute, an entity must establish that it is owned or controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States. An entity need not demonstrate potential for success.

10. Section 33.203 is revised to read as follows:

**§33.203 How does an entity qualify as an MBE or WBE under EPA's 10% statute?**

(a) *Qualifications.* To qualify as an MBE or WBE under EPA's 10% statute, an entity must establish that it is owned and controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States.

(b) *Presumptions.* In accordance with Title X of the Clean Air Act Amendments of 1990, 42

U.S.C. 7601 note, Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women and Disabled Americans are presumed to be socially and economically disadvantaged individuals. In addition, the following institutions are presumed to be entities owned and controlled by socially and economically disadvantaged individuals: HBCUs, Minority Institutions (including Tribal Colleges and Universities and Hispanic-Serving Institutions) and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

(c) *Individuals not members of designated groups.* Nothing in this section shall prohibit any member of a racial or ethnic group that is not designated as socially and economically disadvantaged under paragraph (b) of this section from establishing that they have been impeded in developing a business concern as a result of racial or ethnic discrimination.

(d) *Rebuttal of presumptions.* The presumptions established by paragraph (b) of this section may be rebutted with respect to a particular entity if it is reasonably established that the individual at issue is not experiencing impediments as a result of the individual's identification as a member of a specified group.

(e) *Joint ventures.* A joint venture may be considered owned and controlled by socially and economically disadvantaged individuals, notwithstanding the size of such joint venture, if a party to the joint venture is an entity that is owned and controlled by a socially and economically disadvantaged individual, and that entity owns 51% of the joint venture. As a party to a joint venture, a person who is not an economically disadvantaged individual, or an entity that is not owned and controlled by a socially and economically disadvantaged individual, may not be a party to more than two awarded contracts in a fiscal year solely by joint venture with a socially and economically disadvantaged individual or entity.

11. Section 33.204 is revised to read as follows:

**§33.204 What certifications are acceptable for establishing MBE or WBE status under the EPA DBE Program?**

(a) EPA accepts the following certifications as being acceptable for establishing MBE or WBE status under the EPA DBE Program:

- (1) The United States Small Business Administration (SBA), under its 8(a) Business Development Program (13 CFR part 124, subpart A), Small Disadvantaged Business (SDB) Program (13 CFR part 124, subpart B), or Economically Disadvantaged Woman Owned Small Business (EDWOSB) Program (13 CFR part 127, subpart B);
- (2) The United States Department of Transportation (DOT), under its regulations for Participation by Disadvantaged Business Enterprises in DOT Programs (49 CFR parts 23 and 26) with U.S. citizenship;
- (3) Any Indian Tribal Government, State Government, local Government or independent private organization certification that meets the criteria set forth in §33.202 or §33.203; or
- (4) The EPA DBE self-certification as described in §33.205.

(b) Such certifications shall be considered acceptable for establishing MBE or WBE status, as appropriate, under EPA's DBE Program as long as the certification meets EPA's U.S. citizenship requirement under §33.202 or §33.203.

12. Section 33.205 is revised to read as follows:

**§33.205 How does an entity become self-certified by EPA?**

(a) An entity may self-certify as an MBE or WBE under the EPA DBE Program. To self-certify, the entity must register in the EPA Small Business Vendor Profile System (SBVPS) and attest to meeting the eligibility requirements set forth in §33.202 or §33.203.

(b) EPA DBE Program's self-certifications are only applicable to opportunities funded by EPA financial assistance agreements and are not recognized by other federal, state or local organizations.

13. Section 33.206 is revised to read as follows:

**§33.206 Is there a list of EPA certified MBEs and WBEs?**

A list of firms that have chosen to self-certify as an MBE or WBE under the EPA DBE Program can be accessed through the EPA SBVPS on the OSBP website. EPA will not maintain a list of firms certified through other entities.

**§33.207 [Removed and Reserved]**

14. Section 33.207 is removed and reserved.

15. Section 33.208 is revised to read as follows:

**§33.208 How long does an MBE or WBE self-certification from EPA last?**

Self-certifications are valid for a period of three years from the date an entity is self-certified in the EPA SBVPS. Entities are required to re-enter their registration information in the EPA SBVPS every three years in order to maintain MBE or WBE status under the DBE program. Entries in the EPA SBVPS older than three years will be automatically removed from the system.

**§33.209 [Removed and Reserved]**

16. Section 33.209 is removed and reserved.

17. Section 33.210 is revised to read as follows:

**§33.210 Does an entity self-certified as an MBE or WBE by EPA need to keep EPA informed of any changes that may affect the entity's certification?**

Should there be any changes to the entity's circumstances that affects its ability to meet

disadvantaged status, ownership, and/or control requirements of this subpart, the entity must remove its self-certification entry in the EPA SBVPS within 30 days of the occurrence of the change. Failure to comply may result in the loss of MBE or WBE certification under EPA's DBE Program and EPA may take other remedies that may be legally available. Failure to comply may result in the loss of MBE or WBE certification under EPA's DBE Program, and EPA may take other remedies that may be legally available.

**§33.211 [Removed and Reserved]**

18. Section 33.211 is removed and reserved.

**Subpart C- Good Faith Efforts**

19. Section 33.301 is revised to read as follows:

**§33.301 What does this subpart require?**

- (a) The good faith efforts are methods used by all EPA recipients to ensure that DBEs have the opportunity to compete for procurements funded by EPA financial assistance dollars.
- (b) A recipient, including one exempted from applying the fair share objective requirements by §33.411, is required to make good faith efforts whenever making procurements under an EPA financial assistance agreement.
- (c) Good faith efforts are required even if the fair share objectives have been achieved under subpart D.
- (d) Methods used to adhere to good faith requirements must be documented and retained in the recipient's records; this documentation should include, but is not limited to, email logs, phone logs, electronic searches and communication, handouts, flyers or similar records.
- (e) Recipients are required to ensure that the requirements of this subpart are passed down to all sub-recipients/ prime contractors.

- (f) There are no exemptions to the requirements of this subpart.
- (g) This subpart does not negate the post federal award requirements set forth in 2 CFR part 200.
- (h) The following is a list of actions a recipient must perform to satisfy the good faith effort requirement:
- (1) Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities by placing DBEs on solicitation lists and soliciting them whenever they are potential sources.
  - (2) Make information on forthcoming opportunities available to DBEs and arrange time frames for contracts and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30 calendar days before the bid or proposal closing date.
  - (3) Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs; this includes, where appropriate, breaking out requirements into economically feasible units to facilitate DBE participation.
  - (4) Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.
  - (5) Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations, when feasible, to conduct the efforts described in paragraphs (h)(1) through (4) of this section.
- (i) A recipient should make every attempt to conduct the efforts described in paragraphs (h)(1) through (5) of this section. In the event that one or more of the aforementioned efforts cannot be

performed, the circumstances that have prohibited the full execution of each step should be documented and retained in the recipient's records. Recipients that fail to meet their fair share goals will not be penalized provided they attempt to follow the good faith efforts and adequately document the methods used to solicit DBEs. However, failure to retain proper documentation may constitute noncompliance and result in remedial action as described in §33.105.

20. Section 33.302 is amended by revising paragraphs (c) through (i) to read as follows:

**§33.302 Are there any additional contract administration requirements?**

\* \* \* \* \*

(c) If a DBE subcontractor fails to complete work under the subcontract for any reason, the recipient must require the prime contractor to employ the good faith efforts described in §33.301(h) if soliciting a replacement subcontractor.

(d) A recipient must require its prime contractor to have its DBE subcontractors complete EPA Form 6100-3—DBE Program Subcontractor Performance Form. A recipient must then require its prime contractor to include all completed forms as part of the prime contractor's bid or proposal package.

(e) A recipient must require its prime contractor to complete and submit EPA Form 6100-4—DBE Program Subcontractor Utilization Form as part of the prime contractor's bid or proposal package.

(f) Copies of EPA Form 6100-2—DBE Program Subcontractor Participation Form, EPA Form 6100-3—DBE Program Subcontractor Performance Form, and EPA Form 6100-4—DBE Program Subcontractor Utilization Form may be obtained online from EPA OSBP's Home Page.

(g) Failure to include EPA Form 6100-3 and EPA Form 6100-4 in a bid or proposal package may constitute non-responsiveness. A recipient may consider this non-responsiveness in evaluating a

prime contractor's proposal.

(h) A recipient must ensure that each procurement contract it awards contains the term and condition specified in 2 CFR part 200, appendix II, concerning compliance with the requirements of this part. A recipient must also ensure that this term and condition is included in each procurement contract awarded by an entity receiving an identified loan under a financial assistance agreement to capitalize a revolving loan fund.

(i) In addition to requirements stated above, all procurement contracts awarded by a recipient must contain provisions detailed in 2 CFR part 200, appendix II, as applicable.

21. Section 33.303 is revised to read as follows:

**§33.303 Are there special rules for loans under EPA financial assistance agreements?**

A recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, including, but not limited to, a State under the CWSRF or DWSRF or an eligible entity under the Brownfields Cleanup Revolving Loan Fund program, must require that borrowers receiving identified loans comply with the good faith efforts described in §33.301 and the contract administration requirements of §33.302. This provision does not require that such private and nonprofit borrowers expend identified loan funds in compliance with any other procurement procedures contained in 2 CFR part 200, subpart D (Post Federal Award Requirements, Procurement Standards), or 40 CFR part 35, subpart O, as applicable.

22. Section 33.304 is amended by revising the section heading and paragraphs (a) through (c) to read as follows:

**§33.304 What special rules apply to a Native American (either as an individual, organization, Tribe or Tribal Government or consortium) recipient or prime contractor when following the good faith efforts?**

(a) A Native American (either as an individual, organization, corporation, Tribe or Tribal Government or consortium) recipient or prime contractor must follow the good faith efforts in §33.301(h) only if doing so would not conflict with existing Tribal or Federal law, including but not limited to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e), which establishes, among other things, that any federal contract, subcontract, grant, or subgrant awarded to Indian organizations or for the benefit of Indians, shall require preference in the award of subcontracts and subgrants to Indian organizations and to Indian-owned economic enterprises.

(b) Tribal organizations awarded an EPA financial assistance agreement have the ability to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the good faith efforts. Tribal governments with promulgated tribal laws and regulations concerning the solicitation and recruitment of Native-owned and other minority business enterprises, including women-owned business enterprises, have the discretion to utilize these tribal laws and regulations in lieu of the good faith efforts. If the effort to recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the good faith efforts. All tribal recipients still must retain records documenting compliance in accordance with §33.501 and must report to EPA on their accomplishments in accordance with §33.502.

(c) Any recipient, whether or not Native American, of an EPA financial assistance agreement for the benefit of Native Americans, is required to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the good faith efforts. If the efforts to solicit and recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the good

faith efforts.

\* \* \* \* \*

#### **Subpart D- Fair Share Objectives**

23. Section 33.401 is revised to read as follows:

##### **§33.401 What does this subpart require?**

A recipient must either negotiate with the appropriate EPA award official or his/her designee fair share objectives for MBE and WBE participation in procurement under the financial assistance agreements, or use the approved fair share objective of another recipient with the same or similar relevant geographic buying market, purchasing the same or similar items.

24. Section 33.402 is revised to read as follows:

##### **§33.402 Are there special rules for loans under EPA financial assistance agreements?**

(a) A recipient of an EPA financial assistance agreement to capitalize revolving loan funds must either:

(1) Apply its own fair share objectives negotiated with EPA under §33.401 to identified loans using a substantially similar relevant geographic market;

(2) Negotiate separate fair share objectives with entities receiving identified loans, as long as such separate objectives are based on demonstrable evidence of availability of MBEs and WBEs in accordance with this subpart; or

(3) Use the approved fair share objective of another recipient with the same or similar relevant geographic buying market, with the same or similar items.

(b) If procurements will occur over more than one year, the recipient should apply the fair share objectives to the year in which the procurement action occurs.

25. Section 33.403 is revised to read as follows:

### **§33.403 What is a fair share objective?**

A fair share objective is an objective based on the capacity and availability of qualified, certified MBEs and WBEs in the relevant geographic market compared to the number of all qualified entities in the same market, to reflect the level of MBE and WBE participation expected absent the effects of discrimination. A fair share objective is not a quota.

26. Section 33.404 is revised to read as follows:

### **§33.404 When must a recipient negotiate fair share objectives with EPA?**

A recipient must submit its proposed MBE and WBE fair share objectives and supporting documentation to EPA within 90 days after its acceptance of its financial assistance award. EPA must respond in writing to the recipient's submission within 45 days of receipt, either agreeing with the submission or providing initial comments for further negotiation. Failure to respond within this time frame may be considered as agreement by EPA with the fair share objectives submitted by the recipient. MBE and WBE fair share objectives must be agreed upon by the recipient and EPA before funds may be expended for procurement under the recipient's financial assistance agreement.

27. Section 33.405 is amended by:

- a. Revising paragraphs (a), (b) introductory text, and (b)(1) and (2);
- b. Adding paragraph (c)(4).

The revisions and addition read as follows:

### **§33.405 How does a recipient determine its fair share objectives?**

(a) Unless a recipient chooses to use the approved fair share objective of another recipient, it must determine its fair share objectives based on demonstrable evidence of the number of certified MBEs and WBEs that are ready, willing, and able to perform in the relevant geographic

market. The market may be a geographic region of a State, an entire State, or a multi-State area. Fair share objectives must reflect the recipient's determination of the level of MBE and WBE participation it would expect absent the effects of discrimination. A recipient must propose separate objectives for MBEs and WBEs.

(b) *Step 1.* A recipient must first determine a base figure for the relative availability of MBEs and WBEs. The following are examples of approaches that a recipient may take. Any percentage figure derived from one of these examples should be considered a basis from which a recipient begins when examining evidence available in its jurisdiction. These examples are provided as a starting point and are not intended as an exhaustive list.

(1) *MBE and WBE directories and Census Bureau data.* Separately determine the number of certified MBEs and WBEs that are ready, willing, and able to perform in the relevant geographic market from an MBE/WBE directory such as those provided by the Department of Transportation. When using the Census Bureau's County Business Pattern (CBP) database, determine the number of all qualified businesses available in the market that perform work in the same business industries. Separately divide the number of MBEs and WBEs by the number of all businesses to derive a base figure for the relative availability of MBEs and WBEs in the market.

(2) *Data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study conducted within the preceding ten years comparing the available MBEs and WBEs in the relevant geographic market with their actual usage by entities for procurements in the same business industries.

\* \* \* \* \*

(c) \* \* \*

(4) Unless exempt under §33.411, a recipient that fails to establish and implement goals as

provided in this section will be considered noncompliant and EPA may take remedial action under 2 CFR 200.338, as appropriate, or any other action authorized by law, including, but not limited to, enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

28. Section 33.407 is revised to read as follows:

**§33.407 How long do MBE and WBE fair share objectives remain in effect?**

Once MBE and WBE fair share objectives have been negotiated, they will remain in effect for five fiscal years unless there are significant changes to the data supporting the fair share objectives. The fact that a disparity study utilized in negotiating fair share objectives has become more than ten years old during the five-year period does not by itself constitute a significant change requiring renegotiation.

29. Section 33.408 is amended by revising paragraph (a) to read as follows:

**§33.408 May a recipient use race and/or gender conscious measures as part of this program?**

(a) Should the good faith efforts described in subpart C of this part or other race and/or gender neutral measures prove to be inadequate to achieve an established fair share objective, race and/or gender conscious action (e.g., apply the subcontracting suggestion in §33.301(h)(3) to MBEs and WBEs) is available to a recipient and its prime contractor to more closely achieve the fair share objectives, subject to §33.409. Under no circumstances are race and/or gender conscious actions required by EPA.

\* \* \* \* \*

30. Section 33.410 is revised to read as follows:

**§33.410 Can a recipient be penalized for failing to meet its fair share objectives?**

A recipient cannot be penalized, or treated by EPA as being in noncompliance with this subpart, solely because its MBE or WBE participation does not meet its applicable fair share objective.

However, EPA may take remedial action under 2 CFR 200.338, as appropriate, or any other action authorized by law, including, but not limited to, enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*) for failure to comply with the provisions of this subpart.

31. Section 33.411 is amended by revising paragraphs (a) through (c) to read as follows:

**§33.411 Who may be exempted from this subpart?**

(a) *General.* A recipient of an EPA financial assistance agreement in the amount of \$1 million or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$1 million or less in any one fiscal year, is not required to apply the fair share objective requirements of this subpart. This exemption is limited to the fair share objective requirements of this subpart.

(b) *Clean Water State Revolving Fund (CWSRF) Program, Drinking Water State Revolving Fund (DWSRF) Program, Brownfields Cleanup Revolving Loan Fund (BCRLF) Program or other identified loan recipients.* A recipient under the CWSRF, DWSRF, BCRLF, or other identified loan program is not required to apply the fair share objective requirements of this subpart to an entity receiving one or more identified loans in an amount of \$1 million or less in any one fiscal year. This exemption is limited to the fair share objective requirements of this subpart.

(c) *U.S. Territory and Insular Possession, and Tribal and Intertribal Consortia recipients of program assistance agreements that can be included in Performance Partnership Grants (PPGs) under 40 CFR part 35, subparts A and B, respectively.* U.S Territory and Insular Possession, and

Tribal and Intertribal Consortia recipients of PPG eligible grants are not required to apply the fair share objective requirements of this subpart to those grants. This exemption is limited to the fair share objective requirements of this subpart.

\* \* \* \* \*

### **§33.412 [Removed and Reserved]**

32. Section 33.412 is removed and reserved.

### **Subpart E—Recordkeeping and Reporting**

33. Section 33.501 is amended by revising paragraphs (b) introductory text, (b)(2), and (c) to read as follows:

### **§33.501 What are the recordkeeping requirements of this part?**

\* \* \* \* \*

(b) A recipient of a Continuing Environmental Program Grant or other annual assistance agreements must create and maintain a bidders list. In addition, a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund also must require entities receiving identified loans to create and maintain a bidders list if the recipient of the loan is subject to, or chooses to follow, competitive bidding requirements (See e.g., §33.303). The purpose of a bidders list is to provide the recipient and entities receiving identified loans who conduct competitive bidding with as accurate a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors. The list must include all firms that bid or quote on prime contracts, or bid or quote subcontracts on EPA assisted projects, including both MBE/WBEs and non-MBE/WBEs. The bidders list must only be kept until the assistance agreement project period has expired and the recipient is no longer receiving EPA funding under the assistance agreement. For entities receiving identified loans, the bidders list must only be

kept until the project period for the identified loan has ended. The following information must be obtained from all prime and subcontractors:

\* \* \* \* \*

(2) Entity's telephone number and e-mail address;

\* \* \* \* \*

(c) *Exemptions.* A recipient of an EPA financial assistance agreement in the amount of \$250,000 or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year, is exempt from the paragraph (b) of this section requirement to create and maintain a bidders list. Also, a recipient under the CWSRF, DWSRF, BCRLF, or other identified loan program, is not required to apply the paragraph (b) of this section bidders list requirement of this subpart to an entity receiving an identified loan in an amount of \$250,000 or less, or to an entity receiving more than one identified loan with a combined total of \$250,000 or less in any one fiscal year. This exemption is limited to the paragraph (b) of this section bidders list requirements of this subpart.

34. Section 33.502 is revised to read as follows:

**§33.502 What are the reporting requirements of this part?**

(a) Recipients are required to report MBE and WBE participation annually on EPA Form 5700-52A when one or more of the following conditions are met.

(1) There are funds budgeted for procurements, including funds budgeted for direct procurement by the recipient or procurement under sub-awards or loans in the “Other” procurement category that exceed the simplified acquisition threshold amount of \$150,000;

(2) If at the time of award the budgeted funds for procurement exceed \$150,000, but actual expenditures fall below; or

(3) If subsequent amendments and funding cause the total amount of procurement to surpass the \$150,000 threshold.

(b) Those recipients exempted under §33.411 from the requirement to apply the fair share objectives are required to report if one or more of the conditions stated above is met.

(c) Recipients of financial assistance agreements that capitalize revolving loan programs must require entities receiving identified loans to submit their MBE and WBE participation reports on an annual basis, if one or more of the conditions stated above is met. Reports should be submitted to the financial assistance agreement recipient, rather than to EPA.

(d) Where reporting is required, all procurement actions are reportable, not just that portion that exceeds \$150,000.

(e) Reporting is not required if at the time of award, funds budgeted for procurements are less than or equal to \$150,000 and are maintained below the threshold.

(f) Reports are due by October 30th of each fiscal year, or 30 days after the end of the project period, whichever comes first.

35. Section 33.503 is amended by revising paragraph (a) to read as follows:

**§33.503 How does a recipient calculate MBE and WBE participation for reporting purposes?**

(a) *General.* Only certified MBEs and WBEs are to be counted towards MBE/WBE participation. Amounts of MBE and WBE participation are calculated as a percentage of total financial assistance agreement project procurement costs, which include the match portion of the project costs, if any. Recipients should only report funds used for procurements. For recipients of financial assistance agreements that capitalize revolving loan programs, the total amount is the total procurement dollars in the amount of identified loans equal to the capitalization amount.

\* \* \* \* \*

**Appendix A to Part 33 [Removed]**

36. Appendix A to part 33 is removed.

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